

c. At Trial: n/a

d. At Sentencing: David Gibson, DPD (same address as above).

e. On Appeal: n/a

f. If any Post-Conviction proceeding: n/a

18. Were you sentenced on more than one count of an indictment or information or on more than one indictment or information in the same Court and at the same time? Yes      No x

19. Do you have any further sentence to serve after you complete the sentence imposed by the judgment under attack? Yes      No x

a. If so, give name and location of court which imposed sentence to be served in the future: None

b. Give date and length of sentence to be served in the future: None

c. Have you filed, or do you contemplate filing any petition attacking the judgment which imposed the sentence to be served in the future? Yes      No x

20. If you are not filing this Petition within one (1) year after the final judgment of your conviction or the final decision in your appeal, if any, state here good cause why not, and why the Petition should be heard now: Petition should reach the Court Clerk before the expiration of the one-year deadline.

Respectfully submitted,

Jimmie Davis  
JIMMIE DAVIS  
P.O. Box 208, S.D.C.C.  
Indian Springs, Nevada 89070  
Defendant-Petitioner-In Propria  
Persona

STATE OF NEVADA )  
 ) ss.  
COUNTY OF CLARK )

Pursuant to NRS 15.010, under penalties of perjury, the Undersigned declares that he or she is the Defendant-Petitioner named in the foregoing Petition and knows the contents thereof; that the pleading is true of his or her own personal knowledge, except as to those matters stated on information and belief, and that as to such matters he or she believes it to be true.

DATED this 24 day of December, 1989.

Jimmie Davis  
JIMMIE DAVIS  
Defendant-Petitioner-In Propria  
Persona

///

CERTIFICATE OF SERVICE

I, the Undersigned, hereby certify pursuant to N.R.C.P. 5(b) that I am over the age of 18 years and not a party to the within action. That on the 11<sup>th</sup> day of December, 1989, I served the foregoing PETITION FOR POST-CONVICTION RELIEF by mailing a true and correct copy thereof in a sealed envelope, upon which first class postage was fully prepaid, addressed to: DISTRICT ATTORNEY, CLARK COUNTY, 200 South Third Street, Las Vegas, Nevada 89155; that there is regular communication by mail between the place of mailing and the place so addressed.

Anthony C. Green  
DECLARANT

COPY

FILED

SEP 2 11 46 AM '88

*Loretta Bowman*

CLERK

IN THE JUSTICE COURT OF NORTH LAS VEGAS TOWNSHIP  
COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

Case No. 393-88FN

JIMMIE DAVIS,

Defendant.

REPORTER'S TRANSCRIPT

OF

PRELIMINARY HEARING

BEFORE THE HONORABLE JAMES B. KELLY, JUSTICE OF THE PEACE

August 25, 1988

APPEARANCES:

For the State:

GARY BOOKER, ESQ., and  
WILLIAM HENRY, ESQ.,  
Deputies District Attorney

For the Defendant:

DAVID GIBSON, ESQ.,  
Deputy Public Defender

Reported by: Warren G. Hans, CSR #19

EXHIBIT A

## EXAMINATION INDEX

WITNESS: ARTHUR CULLINS

EXAM. BY:	DIRECT	CROSS	REDIRECT
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MR. BOOKER:	5		
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MR. GIBSON:		17	
-------------	--	----	--

WITNESS: RICHARD L. WARRILOW

EXAM. BY:

MR. BOOKER:	20		
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WITNESS: GILES SHELDON GREEN

EXAM. BY:

MR. BOOKER:	26		
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MR. GIBSON:		30	
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WITNESS: ALFRED F. ADAMS

EXAM. BY:

MR. BOOKER:	32		
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MR. GIBSON:		37	
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MR. HENRY:			38
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1 NORTH LAS VEGAS, CLARK COUNTY, NEVADA, AUGUST 25, 1988

2 \* \* \* \*

3  
4 BY THE COURT: All right.

5 We will now call Case No. 393-88FN, State of Nevada  
6 versus Jimmie Davis.

7 Let the record show that the defendant is present with  
8 counsel.

9 Are both parties ready to proceed in this matter at  
10 this time?

11 BY MR. GIBSON: Defense is ready, Your Honor.

12 BY MR. BOOKER: The State is ready, Your Honor.

13 BY THE COURT: All right.

14 Are there any preliminary motions to be heard in this  
15 case?

16 BY MR. GIBSON: Just to exclude witnesses, Your Honor.

17 BY THE COURT: I've been told that you have one witness  
18 that you're waiting for, but other than that are all of the  
19 witnesses present?

20 BY MR. BOOKER: Correct, Your Honor.

21 BY THE COURT: I believe that the witness you're  
22 waiting for is Dr. Green; is that correct?

23 BY MR. BOOKER: That's also correct, Your Honor.

24 BY THE COURT: Very well.

1 A Yes.

2 Q She did back away. How far did she back away?

3 A To the door, by the door.

4 Q By the door of the apartment?

5 A Yes.

6 Q How far was the counter inside of the house where they  
7 were standing from the front door of the apartment?

8 A About ten feet, fifteen feet.

9 Q So, she backed away ten or fifteen feet towards the  
10 front door?

11 A Uh huh.

12 Q Then what happened?

13 A Then he pointed at her and it just went off.

14 Q It just went off?

15 A Yep.

16 Q Did you see Jimmie cock the gun?

17 A No.

18 Q But, you saw him load the gun with the bullets?

19 A Uh huh.

20 Q When you say "uh huh" does that mean yes?

21 A Yes.

22 Q What happened after the gun went off?

23 A He didn't know he shot her because he doing nothing  
24 but trying to scare her; he apologized, say he was sorry.

1 Q Had she regained possession of the gun at all during  
2 that ten-minute period?

3 A No.

4 Q And, Mr. Davis had the gun because she had given it  
5 to him; isn't that correct?

6 A Yes.

7 Q And, before she gave him that gun, did he threaten her  
8 in any way?

9 A No.

10 Q Did he force her to give him the gun in any way?

11 A No.

12 Q Did he threaten her with any injury to get the gun from  
13 her?

14 A No.

15 Q And so, then after the gun was fired and she said that  
16 she's going to die, or that she's dead, then it is your testimony  
17 that Mr. Davis stayed in the apartment for a few moments --  
18 for awhile -- before he left?

19 A Yes, because he didn't realize she was shot, and once  
20 I mentioned he shot her, he said that he was sorry to her, you  
21 know; that was it.

22 Q Did he look strange to you in any way? Did his face  
23 look strange at all?

24 A Looked like, you know, like his heart dropped, you



CROSS EXAMINATION

BY MR. GIBSON:

Q Dr. Green, was a toxicology done on this person?

A Yes.

Q Did it indicate any narcotics of any kind, or any alcohol, or anything of that type?

A I assume that you have not received a copy of it, but I have one here if you wish, but yes we do have an alcohol of .100 gram percent, cocaine 70 nanograms per millileter of blood, which is a pretty low level. Checked the blood and urine and these were the results.

We have the evidence of cocaine and metabolic by-products, but they are not quantative. So, if you want a copy of that you're welcome to it; but I only have the one copy.

Q Doctor, you can't tell from that wound whether or not it was accidentally inflicted, can you?

A I can't tell what was going on behind the gun, no.

BY MR. GIBSON; I have no further questions.

BY MR. BOOKER: Nothing further, your Honor.

BY THE COURT: May this witness be permanently excused?

BY MR. BOOKER: Yes.

BY MR. GIBSON: Yes.

BY THE COURT: You may leave. You're excused.

(The witness was excused.)

CROSS EXAMINATION

BY MR. GIBSON:

Q Detective, in the statement isn't it true that Mr. Davis indicated that the shooting was accidental?

A He did state that, yes, sir.

BY MR. GIBSON: Nothing further, Your Honor.

BY MR. HENRY: Your Honor, I wonder if I might be allowed to inquire on redirect?

BY MR. GIBSON: I would object, Your Honor.

BY MR. HENRY: It's within the discretion of the Court.

BY THE COURT: You're asking to reopen?

BY MR. HENRY: I'm not asking to reopen; I'm asking to be allowed to redirect examination -- be allowed to do it myself as opposed to Mr. Booker.

BY THE COURT: Fine, but the redirect would be limited simply to any questions he asked, and he only asked one question.

BY MR. HENRY: That's what I intend to get into.

BY THE COURT: Very well.

\* \* \* \*

ASE NO. 88-3100		ADDITIONAL NAME REPORT		4 of 6		3. CLK. SER. NO.	
CLASSIFICATION * Homicide		5. RPT OFC SER. NO. 641		6. NAME OF VICTIM OR PR AS ON PAGE ONE Gelabert, Brittain			
VICTIM-WITNESS							
9. NAME (LAST, FIRST, MIDDLE OR FIRM NAME) Warrilow, R.		10. STAT W		11. SEX M		12. RACE W	
13. ETHNIC H <input type="checkbox"/> NH <input type="checkbox"/>		14. DATE OF BIRTH		15. RESIDENCE PHONE		16. SOCIAL SECURITY NO.	
BUSINESS ADDRESS (CITY, STATE, ZIP) 1301 E. Lake Mead		BUSINESS NAME NLVPD		19. BUSINESS PHONE 649-9111		20. OCCUPATION Patrol Lt.	
22. NAME (LAST, FIRST, MIDDLE OR FIRM NAME) Redcay, A.		23. STAT W		24. SEX M		25. RACE W	
26. ETHNIC H <input type="checkbox"/> NH <input type="checkbox"/>		27. DATE OF BIRTH		28. RESIDENCE PHONE		29. SOCIAL SECURITY NO.	
BUSINESS ADDRESS (CITY, STATE, ZIP) 1301 E. Lake Mead		BUSINESS NAME NLVPD		32. BUSINESS PHONE 649-9111		33. OCCUPATION Patrol	
35. NAME (LAST, FIRST, MIDDLE OR FIRM NAME) DiMauro, A.		36. STAT W		37. SEX M		38. RACE W	
39. ETHNIC H <input type="checkbox"/> NH <input type="checkbox"/>		40. DATE OF BIRTH		41. RESIDENCE PHONE		42. SOCIAL SECURITY NO.	
BUSINESS ADDRESS (CITY, STATE, ZIP) 1301 E. Lake Mead		BUSINESS NAME NLVPD		45. BUSINESS PHONE 649-9111		46. OCCUPATION Patrol	
48. NAME (LAST, FIRST, MIDDLE OR FIRM NAME) Watkins, Celester		49. STAT W		50. SEX M		51. RACE B	
52. ETHNIC H <input type="checkbox"/> NH <input checked="" type="checkbox"/>		53. DATE OF BIRTH 101671		54. RESIDENCE PHONE		55. SOCIAL SECURITY NO. 530687995	
BUSINESS ADDRESS (CITY, STATE, ZIP) 8 E. Webb #C		BUSINESS NAME		58. BUSINESS PHONE		59. OCCUPATION	
61. NAME (LAST, FIRST, MIDDLE OR FIRM NAME)		62. STAT		63. SEX		64. RACE	
65. ETHNIC H <input type="checkbox"/> NH <input type="checkbox"/>		66. DATE OF BIRTH		67. RESIDENCE PHONE		68. SOCIAL SECURITY NO.	
BUSINESS ADDRESS (CITY, STATE, ZIP)		BUSINESS NAME		71. BUSINESS PHONE		72. OCCUPATION	
74. NAME (LAST, FIRST, MIDDLE OR FIRM NAME)		75. STAT		76. SEX		77. RACE	
78. ETHNIC H <input type="checkbox"/> NH <input type="checkbox"/>		79. DATE OF BIRTH		81. RESIDENCE PHONE		82. SOCIAL SECURITY NO.	
BUSINESS ADDRESS (CITY, STATE, ZIP)		BUSINESS NAME		84. BUSINESS PHONE		85. OCCUPATION	
SUSPECT							
88. NAME				89. AKA ADDITIONAL INFORMATION			
ADDITIONAL SUSPECT INFORMATION - DESCRIPTION							
TYPE	92. SEX	93. RACE	94. ETHNIC	95. DATE OF BIRTH	96. AGE	97. HGT	98. WGT
			H <input type="checkbox"/> NH <input type="checkbox"/>				
105. NAME				106. AKA ADDITIONAL INFORMATION			
ADDITIONAL SUSPECT INFORMATION - DESCRIPTION							
TYPE	109. SEX	110. RACE	111. ETHNIC	112. DATE OF BIRTH	113. AGE	114. HGT	115. WGT
			H <input type="checkbox"/> NH <input type="checkbox"/>				
122. NAME				123. AKA ADDITIONAL INFORMATION			
ADDITIONAL SUSPECT INFORMATION - DESCRIPTION							
TYPE	126. SEX	127. RACE	128. ETHNIC	129. DATE OF BIRTH	130. AGE	131. HGT	132. WGT
			H <input type="checkbox"/> NH <input type="checkbox"/>				
139. NAME				140. AKA ADDITIONAL INFORMATION			
ADDITIONAL SUSPECT INFORMATION - DESCRIPTION							
TYPE	143. SEX	144. RACE	145. ETHNIC	146. DATE OF BIRTH	147. AGE	148. HGT	149. WGT
			H <input type="checkbox"/> NH <input type="checkbox"/>				
NARRATIVE							
SEE CONTINUATION FOR DETAILS.							
EXHIBIT B							
151							
DATE/TIME PROCESSED		3. CLK. SER. NO.		158. PERSON REPORTING			
SUPERVISOR APPROVING (PRINT)		SER. NO.		159. OFFICER REPORTING (PRINT)			
				M.L. Kincaid			
				SER. NO. 641			

## CONTINUATION REPORT

CASE NO. 88-8100	2. RPT. OFC. SER. NO. 641	3. NAME OF VICTIM OR PERSON REPORTING Gelabert, Brittain	4. PAGE 5 of 6
CLASSIFICATION Homicide			

On Sunday, 073188, 1715 hours, I was dispatched to 25 Rose Cir. in reference to a possible gunshot victim.

I arrived at 25 Britz Cir. and was advised that a female had been shot at that address. I exited my vehicle and observed a white female lying on the ground in front of apartment #B. The victim was lying on her right side. She was bleeding from the back, chest, and mouth. The victim took one breath and stopped breathing.

Officers Muschner and Glaizer arrived at 1719 hours. Officer Glazier protected the scene as Officer Muschner and I searched the apartment for suspects, with negative results. I observed what appeared to be blood on the living room floor and also in the entrance way. The victim was lying in a large amount of blood. Approximately 1722 hours Mercy Medic 25 and Engine 51 from the North Las Vegas Fire Department arrived. The paramedics advised that the victim had expired. Approximately 1723 hours, Lt. Warrilow arrived and assumed command of the scene. He requested Detectives, Identification and the coroners office respond. I contacted a possible witness, Deborah Edwards. She was hysterical and I was unable to understand her. I was able to ascertain Edwards was the victim's roommate. She stated they lived on Webb Street but did not know the numbers. She further stated that the victim's name was possibly "Lana". I spoke with a second witness, Kim Miller. She stated she was walking northbound on Stocker when a subject known to her as "Junior" ran past her yelling, "Jimmy" had just shot a girl. She further stated that the weapon used belonged to the victim and the shooting was an accident. She could not tell me the real names of "Jr" or "Jimmie". She did advise that "Junior" had a mother that lived on Webb. I had previously (072088) made a traffic stop on a female, Rita Mayfield from 8 E. Webb #C. At the time of the stop she advised her son lived at 25 Britz apt #B. Officers Gandy, Redcay, DiMauro and I went to the apartment. I contacted Celester Watkins who advised he knew the two suspects only by their street names. While we were speaking with Watkins, neighborhood kids advised that "Jimmie" was Jimmie Davis from 18 W. Webb apartment #B. We responded to the address to locate Mr. Davis. Davis was not at the address but we spoke with a female who advised "Junior" was Arthur Cullins. It should be noted I had observed a yellow Porsche normally driven by Cullins, leaving the scene of the homicide as I had arrived. The vehicle was driven by a black female. I had also on several occasions seen Cullins at the Britz address.

POLICE DEPARTMENT  
City of North Las Vegas  
1301 East Lake Mead Blvd.

Date: 08-01-88

PRIOR TO ANY QUESTIONING, YOU MUST UNDERSTAND THE FOLLOWING RIGHTS

1. You have the right to remain silent.
  2. Anything you say can be used against you in a court of law.
  3. You have the right to the presence of an attorney prior to any questioning.
  4. If you cannot afford an attorney, one will be appointed to you prior to any questioning if you so desire.
- If you wish to waive all of the above rights, and answer questions now without an attorney present, you have the right to stop answering questions at any time during the interview.

DO YOU UNDERSTAND FULLY WHAT YOU HAVE BEEN TOLD: Ans: yes Sign: Jimmie DavisWAIVER

I can read and write the English language and I have read and understand the statement of my rights as shown above. I understand that I have the right to remain silent, that anything I say can be used against me in a court of law, that I have the right to the presence of an attorney before any questioning, that if I cannot afford an attorney one will be appointed to me prior to any questioning, if I so desire.

I hereby waive my rights as shown above and I am willing to answer questions and make a formal statement.

I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

Witness: Det. AdamsSigned: Jimmie Davis

Witness: \_\_\_\_\_

I, Jimmie Davis, first having been duly informed of my rights by Det. Adams, as shown above, do hereby make the following statement freely and voluntarily and without promises of immunity or reward. My name is Jimmie Davis. I am 16 years of age. I reside at 25 Britz Cir #B. my phone number is 649-7270.

I'm Det. Adams, I'm investigating a homicide that occurred on 07-31-88 at 25 Britz #B. I'm interviewing Jimmie Davis, black male, sixteen years old. Also in the interview is Jimmie Davis's uncle, Webster Davis. Jimmie, at approx. 5:15 PM last date would you tell us where you were at?

A: at the apt. 25 Britz Cir #B where the woman was shot.

Q: Would you tell us who was in the apt. with you?

A: Arthur, Ringo.

Q: Do you know Arthur's last name?

A: I don't know his last name?

Q: Does he have a nickname?

A: Yes, Junior. 4.D

EXHIBIT C

Jimmie Davis

POLICE DEPARTMENT  
City of North Las Vegas  
1301 E. Lake Mead Blvd.

DATE 08-01-88 Page No. 2

STATEMENT OF: Jimmie Davis

STATEMENT OF:

Q: Was you approached in the apt. by a female?

A: Yes.

Q: Do you know this female?

A: No, I've seen her before.

Q: Was she white or black.?

A: White or mexican.

Q: What did she want?

A: She wanted to sell a .38 for \$100.00.

Q: Did she show you the .38?

A: Yes.

Q: What did she do?

A: She pulled it out of her purse along with three or four bullets  
and laid it on the countertop.

Q: Did you pick the gun up?

A: Yes.

Q: Did you open the cylinder?

A: Yes.

Q: Did you load the gun?

A: Yes.

Q: During this time were you negotiating with the white female  
over the price?

A: Yes.

Q: Could you tell me what you were negotiating?

A: We were negotiating to drop the price from \$100.00.

Q: Did you point the gun at the lady and ask her to leave?

A: Yes.

20.53: Did she back away from you?  
(3/86)*Jimmie Davis*

POLICE DEPARTMENT  
City of North Las Vegas  
1301 E. Lake Mead Blvd.

DATE 08-01-88 Page No. 3

STATEMENT OF: Jimmie Davis

A: She wanted to get the gun so she could leave and she didn't want to drop the price.

Q: Did you point the gun at her again?

A: Yes.

Q: Did the gun go off?

A: Yes.

Q: What happened then?

A: We panicked and ran out the house.

Q: What did the lady do?

A: She came out behind us and fell to the ground.

Q: Did you say anything to the lady prior to shooting her?

A: Yes, I tried to help her and I seen she was bleeding and I panicked and ran out the house and got in the car and took off?

A: Who was with you in the car?

A: Ringo.

Q: How old is Ringo?

A: Sixteen or seventeen.

Q: And you drove away with Ringo?

A: Yes.

Q: where did ARthur go.?

A: I don't know, he just disappeared.

Q: Was he in the room with you when the lady got shot?

A: Yes.

Q: Was Ringo in the same room when the shot occurred?

A: Yes, he was.

Q: You said earlier that you had picked the gun off the counter

20.5md the bullets off the counter and loaded the gun, is that correct?  
(3/86)

POLICE DEPARTMENT  
City of North Las Vegas  
1301 E. Lake Mead Blvd.

STATEMENT OF: Jimmie Davis DATE 08-01-88 Page No. 4

A: Yes.

Q: Are you familiar with a revolver pistol?

A: No.

Q: Could you describe the pistol to me?

A: Black with brown handle.

Q: Do you know the caliber?

A: .38.

Q: Did you happen to notice who made the gun?

A: Smith and Wesson.

Q: Did you notice how long the barrel was?

A: It wasn't long, it was halfway. Approximately four inch barrel.

Q: When you panicked out of the house, did you take the gun with you?

A: Yes.

Q: What did you do with the gun?

A: Gave it to Ringo.

Q: do you know what Ringo did with it?

A: We parked the car on Donna str. Apts. and he went in with it and he came back out and he took me to Cheyenne Street.

Q: Did you want this gun from the lady?

A: Yes.

Q: And you said earlier in the statement that you had the gun in your hand and you told the lady to leave, is that correct?

A: Yes.

Q: Were you at that time trying to obtain the gun without paying her for it?

A: Yes.

*James H. Davis*



POLICE DEPARTMENT  
City of North Las Vegas  
1301 E. Lake Mead Blvd.

STATEMENT OF: Jimmie Davis DATE 08-01-88 Page No. 5

Q: Before the shot went off, had you cocked that gun?

A: Yes.

Q: Did you have any intentions to shoot this lady?

A: No, I just wanted to scare her.

Q: You wanted the gun bad enough for her to leave and leave the gun with you?

A: Yes.

Q: Do you understand that question, that you wanted the gun bad enough that you wanted her to leave and you wanted to keep the gun?

A: Yes, I didn't want to pay for it, I wanted to keep it.

Q: Getting back to the negotiations when the lady first came into the apt. did she tell you anything about how she obtained the gun?

A: No, she didn't.

Q: Do you know what this woman was wearing?

A: She had a brown purse, a white shorts set.

Q: Is everything that we've discussed here true to the best of your knowledge?

A: Yes.

Q: Do you know what color this car was that you and Ringo got into?

A: Reddish maroon.

Q: Do you know the make of the car, sir?

A: NO. But if I seen it I'd know.

Q: Do you know whose car it was?

A: No, I don't.

Q: Do you know where Ringo lives?

*[Handwritten signature]*

POLICE DEPARTMENT  
City of North Las Vegas  
1301 E. Lake Mead Blvd.

DATE 08-01-88 Page No. 6

STATEMENT OF: Jimmie Davis

A: Over on Donna Street.

Q: Could you show me where it is?

A: Yes, I could show you where he lives.

Q: Just you and Ringo got in the car and drove away?

A: Yes.

Q: Arthur didn't get in the car?

A: No.

Q: During your negotiations about the gun, did you offer the lady any dope for the gun?

A: No, I didn't.

Q: Did anybody in the apt. offer her any dope for the gun?

A: No. *Jimmie Davis*

City of North Las Vegas  
1301 E. Lake Mead Blvd.

I, Arthur Cullins, am not under arrest for, nor am I being detained for any criminal offenses concerning the events I am about to make known to Det. Al Adams

Without being accused of or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the following information of my own free will, for whatever purposes it may serve.

I am 18 years of age, and I live at 9 W. Webb #A NLVN

This is Det. Adams, I'm investigating a homicide that occurred on 7-31-88 at approx. 1715 hours. This occurred at 25 Britz Cir. #B. I'm interviewing Arthur James Cullins. Mr. Cullins were you at 25 Britz Cir. #B last evening at approx. 5:15 PM?

A: Yes, I was.

Q: Who is renting this apt?

A: A friend of mine, a black female named Rita.

Q: Would you explain to me who was in the apt. at about that time?

A: Me, a friend Jimmie Davis and a friend of his, a black male juvenile.

Q: What is this unidentified look like?

A: He was short about 5'3 or 5'4, I cant say how much he weighs and has a curl with the sides shorter than the top.

Q: While the three of you were in the apt. were you approached by anybody?

A: Yes, a lady came in to sell a gun.

Q: Do you know this girls name?

A: Yes, Alana. She stays by my grandmother. *AC*

I have read each page of this statement consisting of 4 page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct.

Dated at NLVD, this 1st day of Ac 8 19 88

WITNESS: *AC*

*Arthur Cullins*  
Signature of person giving voluntary statement

WITNESS: \_\_\_\_\_

POLICE DEPARTMENT  
City of North Las Vegas  
1301 E. Lake Mead Blvd.

DATE 08-01-88 Page No. 2

STATEMENT OF: Arthur Cullins

Q: Would you tell me what occurred when this lady wanted to sell you the gun?

A: She came in and wanted \$100. for it and she dropped it to \$75.00 and Jimmie told her to drop the price lower than \$75.00 and then he loaded the gun and pointed it at her and she was approaching him and he said to get away from him and he pointed it again at her and told her to drop the price and then the gun just went off.

Q: You said that Jimmie Davis loaded the gun, did the lady hand it to him or what?

A: No, she took it out of her purse and three or four bullets out and laid it on the counter.

Q: This was when Jimmie walked over and picked it up and loaded it?

A: She wouldn't drop the price and that's when he picked it up and loaded it.

Q: What kind of gun was it?

A: .38 revolver.

Q: What did it look like?

A: It was black with a brown handle and bigger than a snub nose, about a four inch barrell.

Q: Do you know who made the gun?

A: No.

Q: Did you pick the gun up?

A: I never touched it.

Q: Where were you all at when the shot went off?

A: She was standing by the front door, I was standing in the dining room, Jimmie was standing about three feet from me and his

AC

POLICE DEPARTMENT  
City of North Las Vegas  
1301 E. Lake Mead Blvd.

DATE 08-01-88

Page No. 3

STATEMENT OF: Arthur Cullins

~~friend~~<sup>friend</sup> was standing about two feet from him.

Q: Did you see Jimmie cock the gun?

A: I thought it was just loaded but I didn't know it was cocked.  
It just went off?

Q: what did you do then?

A: She fell and as she was getting back up and I said "cuz, you  
shot her, you shot her". to jimmie. and he said "oh, I'm sorry."~~He said that to her.~~Q: Do you think that Jimmie was trying to get the gun for nothing,  
trying to scare her?A: Yes, cause I don't think he had the heart to shoot her and  
to me he just didn't know how to handle a gun.Q: Had you and Jimmie discussed trying to get the gun from the  
girl?A: No, I told you I ran out the door to get help and I talked  
to Tracy in Apt. #A to get an ambulance and I told them twice. I  
was there for at least five or ten minutes before I left and I went  
around to Britz Circle.

Q: Did you tell anybody in Britz Circle what happend?

A: Yes, I told a lady named Star .

Q: What did you tell her?

A: I told her this asshole Jimmie had just shot a lady.

Q: Where did Jimmie and this other dude go?

A: I don't know. They just got in a car and left.

Q: What kind of car?

A: It was a burgundy four door, maybe Malibu. AC

POLICE DEPARTMENT  
City of North Las Vegas  
1301 E. Lake Mead Blvd.

DATE 08-01-88 Page No. 4

STATEMENT OF: Arthur Cullins

Q: Did Jimmie offer any dope or anything for this gun?

A: He offered her dope but she wanted strictly cash.

Q: What kind of dope was he trying to offer?

A: It was rocks but he didn't have none.

Q: Did he have any money?

A: Probably about twenty or thirty dollars.

Q: Do you stay down there on 25 Britz Circle a lot?

A: I come down there a bit, but I usually go next door at apt.

A and talk to a girl, Lusteena.

Q: Have you been offered any rewards or immunity to come in and give this statement or did you come in on your own free will?

A: No, I just came in becuae officers came by my Auntie's house and she heard my name on the news and she told me to come down here so I did.

Q: Do you think that Jimmie Davis intentionally shot this gir?

A: NO, I think it was an accident. Because when he said "I'm sorry" to her it looked like his heart dropped?

A: You think he was just trying to take the gun?

A: No, I think he was just trying to scare her.

Q: Is there anything else you'd like to add to this statement?

A: NO.

Q: Is this statement true and correct as far as you know?

A: Yes.

Q: Do you know where this other black juvenile lives?

A: NO, I just know him from Donna Street crips. All the Donna Street Crips look alike, same age and stick together. A.C.

FILED

DISTRICT COURT  
CLARK COUNTY, NEVADA

JAN 9 3 28 PM '92

JIMMIE DAVIS,

Petitioner,

vs.

THE STATE OF NEVADA

Respondent,

Case No: C-85078

Dept No: 1V

Docket No: "C"

=====

Date of Hearing

Time of Hearing

2-26-92

**AFFIDAVIT IN SUPPORT OF**  
**PETITION FOR POST-CONVICTION RELIEF**

STATE OF NEVADA )

) ss:

COUNTY OF WHITE PINE )

I, JIMMIE DAVIS, do hearby swear under penalty of perjury  
that the assertions of this affidavit are true.

1. That I Jimmie Davis am the Petitioner in the above-  
entitled action and make this affidavit in support of my  
Petition for Post-Conviction Relief.

2. That Petitioner is competent to testify and therefor  
would be able to testify if called upon to do so and have  
personal knowledge to the truth of the facts herein set out,  
except to those matters stated on information and belief,  
and as to such matters he believes the same to be true.

3. That Petitioner is entitled to relief sought.

4. That Petitioner makes this affidavit in good faith.

5. That Petitioner was denied Due Process of Law.

1           6. That Petitioner was denied the effective assistances  
2 of counsel during plea negotiation's and plea hearing. Counsel  
3 never explained to Petitioner the elements of the crime charged  
4 when case law clearly states that in order for a guilty plea  
5 to be accepted the defendant must know the elements of the  
6 crime to which he plea's.

7           7. That Petitioner was denied effective assistances of  
8 counsel when counsel failed to explain what "MALICE AFORETHOUGHT"  
9 meant, and that by pleading guilty Petitioner was admitting  
10 that he intentionally killed the victim despite Petitioners  
11 unwaviering claim that the shooting was accidental.

12           8. That appellate counsel failed to persue or investigate  
13 after being told by an eye witness that they would testify  
14 to the fact that the shooting was indeed an accidental shooting.  
15 Yet counsel still had a sixteen (16) year old plea guilty to  
16 First Degree Murder and agree to Life in prison without the  
17 possibilty of parole, knowing the Petitioner was illiterate  
18 to the criminal justice system. Whitness being Arthur Cullins.

19           9. That Petitioners plea of guilt was not knowing and  
20 intelligently or understandingly entered when the Courts failed  
21 to canvass the Petitioner properly in open court, assuring  
22 that he understood each and every element of the crime  
23 before a plea of guilty could be accepted by the Court.

24           10. That Petitioner was seriously prejudiced as a result  
25 of counsel's errors, omissions and counsel's failure to  
26 investigate or interview witnesses and research applicable  
27 law which would negate a First Degree Murder charge based upon  
28 the factual circumstances surrounding the case at bar, thus



1 denying Petitioner his Sixth Amendment Right to resonable  
2 effective assistance of counsel.

3 11. That the records of the Plea Hearing are bare of the  
4 elements of First Degree Murder therefor the Courts should  
5 not have accepted the Petitioners guilty plea whereas no factual  
6 statement to the Courts were made which would constitute an  
7 admission to the elements of the offense charged.

8 12. That in prosecution of murder where defendant pleads  
9 guilty, statue requires that Trial Court first determine  
10 degree of guilt and then fix punishment upon theory that no  
11 issue is left to guilt of crime of murder, Petitioner clearly  
12 demonstrates that the Due Process in this claim was not carried  
13 out therefore denying him of this right.

14 13. That Petitioner was denied Due Process of Law by use  
15 of robbery allegation to establish felony murder. At the plea  
16 hearing, the prosecutor dismissed the robbery charges and told  
17 the Courts that it was not considered, than used robbery to  
18 establish murder in the first degree. The Court did not have  
19 jurisdiction to accept guilty plea based on robbery allegations.

20 14. That the Court dismissed the robbery information  
21 and agreed that it was jurisdictional error, futhermore the  
22 information used to establish the degree of the crime violated  
23 the Due Process Clause.

24 15. That Petitioner was denied Due Process of Law when  
25 the police failed to notify his parents or attorney before the  
26 Petitioners interrogation, arrest or indictment, whereas a minor  
27 is entitled to the presence of his parents or attorney before  
28 he is charged with a crime as an adult.

1 Under the penalty of perjury, and pursuant to NRS 208.165  
2 that above statement/Affidavit is true and correct to the best  
3 of Affiants personal knowledge.

4 DATED this 22nd day of October 1991.

5  
6 Jimmie Davis 27362  
7 Jimmie Davis  
8 Ely State Prison  
P.O.B.1989  
Ely, Nevada 89301

9  
10 Thomas Caruso  
11 Thomas Caruso/Witness

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24  
25  
26  
27  
28  
Frank LaPena  
Frank LaPena/Witness

MARK B. BAILUS, ESQ.  
Nevada Bar No. 002284  
LAW OFFICES OF CHERRY & BAILUS  
600 South Eighth Street  
Las Vegas, NV 89101  
(702) 385-3788

Attorney for Petitioner  
JIMMIE DAVIS

FILED  
JAN 9 3 27 PM '92

*[Signature]*  
CLERK

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \* \* \*

JIMMIE DAVIS,  
  
Petitioner,  
  
vs.  
  
STATE OF NEVADA,  
  
Respondent.

CASE NO. C 85078  
DEPT. NO. IV  
DOCKET NO. "C"

**SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT  
OF PETITIONER'S PETITION FOR  
POST-CONVICTION RELIEF**

Date of Hearing: 2-26-92  
Time of Hearing: \_\_\_\_\_

COMES NOW, Petitioner, JIMMIE DAVIS, by and through his court  
appointed counsel of record, MARK B. BAILUS, ESQ., of the LAW  
OFFICES OF CHERRY & BAILUS, and hereby files his Supplemental  
Points and Authorities in support of his Petition for Post-  
Conviction Relief.

These Supplemental Points and Authorities are made and based  
upon the papers, pleadings and documents on file herein, the Points

. . .  
. . .  
. . .  
. . .

CE10  
1

RI

*Law Offices of  
Cherry & Bailus*  
501 SOUTH SIXTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 385-3788  
FAX (702) 385-5125

*[Circular Stamp]*  
JAN 9 1992

1 and Authorities that follow hereinafter and upon the argument of  
2 counsel to be adduced at the hearing hereon.

3 DATED this 9 day of January, 1992.

4 LAW OFFICES OF CHERRY & BAILUS

5  
6 By Mark B. Bailus  
7 MARK B. BAILUS, ESQ.  
8 600 South Eighth Street  
9 Las Vegas, Nevada 89101  
10 Attorney for Petitioner

11 NOTICE OF HEARING

12 TO: STATE OF NEVADA, Respondent; and

13 TO: REX BELL, ESQ., Attorney for Respondent:

14 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the  
15 undersigned will bring the Petitioner's PETITION FOR POST-  
16 CONVICTION RELIEF on for hearing on the 20 day of Feb,  
17 1992, at the hour of 9 A.m., in Department No. IV of  
18 the above-entitled Court, or as soon thereafter as counsel may be  
19 heard.

20 DATED this 9 day of January, 1992.

21 LAW OFFICES OF CHERRY & BAILUS

22 By Mark B. Bailus  
23 MARK B. BAILUS, ESQ.  
24 600 South Eighth Street  
25 Las Vegas, Nevada 89101  
26 Attorney for Petitioner  
27  
28

Law Offices of  
Cherry & Bailus  
501 SOUTH SIXTH STREET  
LAS VEGAS, NEVADA 89101  
(702) 385-3788  
FAX (702) 385-5125

**MEMORANDUM OF SUPPLEMENTAL POINTS AND AUTHORITIES**  
**IN SUPPORT OF PETITIONER'S PETITION FOR**  
**POST-CONVICTION RELIEF**

I.

**PETITIONER'S PLEA OF GUILTY WAS NOT FREELY**  
**AND VOLUNTARILY ENTERED, AND THUS, SHOULD BE SET ASIDE**

Petitioner submits, and the record supports, that the guilty plea herein must be set aside because the record does not affirmatively demonstrate it was knowingly and voluntarily entered. See, Russell v. State, 99 Nev. 264, 265, 661 P.2d 1292 (1983).

In Higby v. Sheriff, 86 Nev. 774, 476 P.2d 959 (1970), the Nevada Supreme Court incorporated the principles enunciated by the United States Supreme Court in their decision, Boykin v. Alabama, 395 U.S. 238 (1969), that where a plea of guilty is accepted, the "record should affirmatively show" that certain "minimal requirements" are met. Generally, said minimal requirements are as follows:

- (1) An understanding waiver of constitutional rights and privileges;
- (2) An absence of coercion by threat or promise of leniency;
- (3) An understanding of the nature of the charge, itself, i.e., the "elements" of the offense;
- (4) An understanding of the consequences of the plea, and the range of the punishments which may be imposed.

The above-stated requirements have been codified in NRS 174.035(1), which provides, in pertinent part:

The court may refuse to accept a plea of guilty, and shall not accept such plea...without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and consequences of the plea. [Emphasis added]

...

1 After a careful evaluation of the record herein, it is  
 2 apparent that it is utterly void of any indication that Petitioner  
 3 understood the elements of the murder charge. Further, the record  
 4 is barren that Petitioner was ever explained of any defenses  
 5 available to him. (Attached hereto as Exhibit "A", and by this  
 6 reference incorporate herein as though fully set forth, is the  
 7 Affidavit of Petitioner, Jimmie Davis).

8 The Court in Higby, supra, quoting from McCarthy v. United  
 9 States, 394 U.S. 459 (1969), in adopting the United States Supreme  
 10 Court's rationale of rigid adherence to Rule 11 of the Federal  
 11 Rules of Criminal Procedure, stated:

12 First, although the procedure embodied in Rule 11 has not  
 13 been held to be constitutionally mandated, it is designed  
 14 to assist the district judge in making the constitution-  
 15 ally required determination that a defendant's guilty  
 16 plea is truly voluntarily. Second, the Rule is intended  
 17 to produce a complete record at the time the plea is  
 18 entered of the factors relevant to this voluntariness  
 determination. Thus, the more meticulously the Rule is  
 adhered to, the more it tends to discourage, or at least  
 to enable more expeditious disposition of, the numerous and  
 often frivolous post-conviction attacks on the constitu-  
 tional validity of guilty pleas.

19 86 Nev. at 779, quoting 395 U.S. at 465.

20 Concluding, the Court in McCarthy stated:

21 Our holding that a defendant whose plea has been accepted  
 22 is violation of Rule 11 should be afforded the opportuni-  
 23 ty to plea anew not only will insure that every accused  
 24 is afforded those procedural safeguards, but also will  
 25 help reduce the great waste of judicial resources  
 26 required to process the frivolous attacks on guilty plea  
 27 convictions that are encouraged and are more difficult to  
 28 dispose of, when the original record is inadequate. It  
 is, therefore, not too much to require that, before  
 sentencing defendants to years of imprisonment, district  
 judges take the few minutes necessary to inform them of  
 their rights and to determine whether they understand the  
 action they are taking.

394 U.S. at 472; see also, 86 Nev. at 779-80.

1 ...The United States Supreme Court recalled in Henderson  
 2 the long-accepted principle that a guilty plea must  
 3 provide a trustworthy basis for believing that the  
 4 defendant is in fact guilty. Thus, the "constitutional  
 5 rule relevant" to such cases is "that the defendant's  
 guilt is not deemed established by entry of a guilty  
 plea, unless he either admits that he committed the crime  
 charged, or enters his plea knowing what the elements of  
 the crime charged are."

6 97 Nev. at 134.

7 After carefully reviewing the canvassing by the court of the  
 8 Petitioner, it is clear there was on discussion as to the "ele-  
 9 ments" of murder, or any other crime. Further, the record is  
 10 barren as to what, if anything, was explained concerning the  
 11 elements of the crime, or whether the Petitioner actually under-  
 12 stood what was explained.<sup>1</sup>

13 A similar scenerio occurred in Hanley v. State, 97 Nev. at  
 14 page 134, wherein the Court observed:

15 There was no mention of murder in the first degree or any  
 16 other crime in this portion of the canvassing; there was  
 17 no mention of the "elements" of first degree murder or  
 18 any other crime; there was no statement as to what, if  
 19 anything, was explained, nor what, if anything, the  
 defendant understood as a result of such explanation. As  
 a showing that defendant under the stated circumstances  
 knew or understood what the elements of the crime he was  
 pleading to were, the record is completely deficient.

20 \* \* \* \*

21 Although we have disclaimed the necessity for "articula-  
 22 tion of talismanic phrases", Heffley v. Warder, 89 Nev.  
 573, 516 P.2d 1403 (1973), in plea hearings and have  
 23 declined to "impose upon our trial judges the rigid  
 requirements imposed upon federal judges when pleas are

24  
 25 <sup>1</sup> Close scrutiny of the record herein reveals that it is  
 26 barren of any indication that trial counsel explained to Petitioner  
 27 the principles of the "felony-murder" rule and how it may be  
 28 applicable to Petitioner's case. Such is important in light of the  
 fact that during a colloquy between the prosecutor and the court at  
 the plea hearing, it appears the prosecutor relied upon the  
 "felony-murder" rule as the underlying basis for the court to  
 accept Petitioner's plea.

1 taken under Federal Rules of Criminal Procedures, Rule  
 2 11, Wynn v. State of Nevada, 96 Nev. 673, 615 P.2d 946  
 3 (1980), we would hold that constitutional requirements  
 4 and the statutory requirement of NRS 174.035(1) demand  
 5 either a showing that the defendant himself (not just his  
 6 attorney) understood the elements of the offense to which  
 7 the plea was entered or a showing that the defendant,  
 8 himself, has made factual statements to the court which  
 9 constitute an admission to the offense pled to [Emphasis  
 10 added]

11 Based on the foregoing, it is obvious that there was no  
 12 adequate showing that the Petitioner understood the particular  
 13 charge he pled guilty to, and specifically, that he understood the  
 14 elements of the crime of murder.

15 Since the Information was never read to the Petitioner on the  
 16 record, and there is absent from the record the necessary affirma-  
 17 tive showing that Petitioner understood the nature of the offense  
 18 to which he was pleading, Petitioner's plea of guilty should be set  
 19 aside. See, DeBose v. State, 100 Nev. 339, 682 P.2d 195 (1984; and  
 20 Sigler v. Director of Nevada State Prisons, 97 Nev. 221, 625 P.2d  
 21 275 (1981).

## 22 II.

### 23 THE PETITIONER WAS DENIED HIS 24 CONSTITUTIONAL RIGHT TO 25 EFFECTIVE ASSISTANCE OF COUNSEL

26 Petitioner submits that he was denied his Sixth Amendment  
 27 right to effective assistance of counsel.

28 It is axiomatic that the Petitioner under the Sixth Amendment  
 was guaranteed the right to the assistance of counsel for his  
 defense, even though he lacked funds for counsel. See, Gideon v.  
Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963). Further, the right  
 to effective and competent assistance of counsel for the right  
 given is not just formal, but a substantial right. See, Powell v.



1 Alabama, 350 U.S. 85, 76 S.Ct. 167 (1955).

2 The traditional standard in Nevada to measure counsel's  
3 conduct to find ineffective assistance of counsel was to determine  
4 whether counsel's representation was of such a low caliber as to  
5 reduce the proceedings to be a "sham, farce, or mockery." See,  
6 White v. State, 95 Nev. 159, 591 P.2d 266 (1979).

7 Such is no longer the standard in Nevada. The appropriate  
8 standard used to determine effectiveness of counsel is stated in  
9 Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), whereby the  
10 Court expressly adopted the "reasonably effective assistance"  
11 standard enunciated in Strickland v. Washington, 104 S.Ct. 2052  
12 (1984):

13 The United States Supreme Court has recently adopted the  
14 "reasonably effective assistance standard for ineffective counsel  
15 in criminal cases. This constitutional standard supplanted  
16 Nevada's traditional 'farce and sham' test.: See, Strickland v.  
17 Washington, 466 U.S. 668, 52 U.S.L.W. 4565 (May 14, 1984).

18 In Strickland v. Washington, supra, the Court stated:

19 The Court has not elaborated on the meaning of the  
20 constitutional requirement of effective assistance in the  
21 latter class of cases -- that is, those presenting claims  
22 of "actual ineffectiveness." In giving meaning to the  
23 requirement, however, we must take its purpose -- to  
24 ensure a fair trial -- as the guide. The benchmark for  
25 judging any claim of ineffectiveness must be whether  
26 counsel's conduct so undermined the proper functioning of  
27 the adversarial process that the trial cannot be relied  
28 on as having produced a just result. Strickland v.  
Washington, supra, at 2064.

\* \* \*

26 A convicted defendant's claim that counsel's assistance  
27 was so defective as to require reversal of a conviction  
28 or death sentence has two components. First, the  
defendant must show that counsel's performance was  
deficient. This requires showing that counsel made

errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Recently, in Wilson v. State, 105 Nev. 110, 112, 771 P.2d 583 (1989), the Court concluded:

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court defined standards for a defendant's Sixth Amendment right to effective assistance of counsel. The Court described two components of a showing of ineffective assistance of counsel in the context of a murder conviction or death sentence. First, the accused must show that counsel's representation fell below an objective standard of reasonableness. Id. at 687.

In order to prove prejudice, the accused must show that there is a reasonable probability that, but for counsel's mistakes, the result of the proceeding would have been different. Id. at 694.

The foregoing is in accord with the standard adopted by the Ninth Circuit in Cooper v. FitzHarris, 586 F.2d 1235 (9th Cir. 1978), cert. denied, 440 U.S. 974 (1979).

Defense counsel's errors or omissions must reflect a failure to exercise the skilled judgment or diligence of a reasonably competent criminal defense attorney; they must be errors a reasonably competent attorney acting as a diligent conscientious advocate would not have made.

After a careful review of the record herein, it is apparent that Petitioner's trial counsel did not expend the time and/or energies necessary to prepare a meaningful defense, nor conduct "a reasonably substantial investigation" into a plausible line of defense. Specifically, trial counsel failed to investigate and/or interview certain witnesses who would have testified that the shooting was accidental and not intentional. (See Affidavit of

Petitioner attached hereto as Exhibit "A".)

### III.

#### **AN EVIDENTIARY HEARING ON THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL IS WARRANTED**

As argued previously, many of Petitioner's contentions contained factors outside the record, thus, an evidentiary hearing is warranted in the case sub judice.

This Court has uniformly held that if a post-conviction petition alleges facts which, if true, would entitle the Petitioner to relief, the petitioner must be afforded an evidentiary hearing unless the available record repels the petitioner's claims. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984); Hatley v. State, 100 Nev. 214, 678 P.2d 1160 (1984); Grodin v. State, 97 Nev. 454, 634 P.2d (1981); Doggett v. State, 91 Nev. 768, 542 P.2d 1066 (1975).

In Gibbons v. State, 97 Nev. 520, 634 P.2d 1214 (1981) the Court specifically found that because most claims of ineffective assistance of trial counsel involves question of fact that can only be resolved by the District Court at an evidentiary hearing post conviction relief is the proper remedy. See also, Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983) wherein the Court, after examining the petition and the affidavit of the defendant, determined that an evidentiary hearing was necessary. In Bolden, supra, the court stated:

"...if a petition for post conviction relief contains allegations which, if true, would entitle the petitioner to relief, an evidentiary hearing thereon is required."

Id. Nev. at 183, 659 P.2d at 886.

1 Similarly, in Lewis v. State, 100 Nev. 456, 686 P.2d 219  
 2 (1984) the Court specifically refused to review the effectiveness  
 3 of counsel on direct appeal, stating "effectiveness of counsel may  
 4 be reviewed after an evidentiary hearing has been held in which  
 5 counsel can testify concerning his performance." Lewis, 100 Nev.  
 6 at 461.

7 Petitioner submits it was the legislative intent in enacting  
 8 NRS 177.315, et seq., that the performance of counsel be tested in  
 9 an evidentiary setting wherein counsel is able to defend himself  
 10 concerning the allegations and a defendant is allowed to challenge  
 11 the actions and performance of counsel. Accord, Gibbons v. State,  
 12 supra.

### 13 CONCLUSION

14 Based on the foregoing specification of errors and those  
 15 contained in the proper person Petition for Post-Conviction Relief,  
 16 Petitioner submits that said Petition for Post-Conviction Relief  
 17 should be granted or in the alternative, an evidentiary hearing  
 18 should be conducted.

19 Respectfully submitted this 9 day of January, 1992.

20 LAW OFFICES OF CHERRY & BAILUS

21  
 22 By Mark B. Bailus  
 23 MARK B. BAILUS, ESQ.  
 24 600 South Eighth Street  
 25 Las Vegas, Nevada 89101  
 26 Attorney for Petitioner  
 27  
 28

64

1 REX BELL  
 2 DISTRICT ATTORNEY  
 3 Nevada Bar #001799  
 4 200 S. Third Street  
 5 Las Vegas, Nevada 89155  
 6 (702) 455-4711  
 7 Attorney for Plaintiff  
 8 THE STATE OF NEVADA

APR 15 8 31 AM '92

## DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA )

Respondent, )

vs. )

JIMMIE DAVIS, #0854767 )

Petitioner. )

CASE NO. C85078

DEPT. NO. IV

DOCKET NO. C

FINDING OF FACTS AND CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 3/25/92

TIME OF HEARING: 9:00 A.M.

17 THIS CAUSE having come on for hearing before the Honorable  
 18 Gerard Bongiovanni, District Judge, on the 25th day of March, 1992,  
 19 the petitioner not being present, being represented by MARK BAILUS,  
 20 ESQUIRE, the Respondent the State of Nevada, by REX BELL, District  
 21 Attorney, through TERESA LOWRY, Deputy District Attorney, and the  
 22 Court having considered the matter, including briefs, transcripts,  
 23 arguments of counsel, wherefore, the Court makes the following:

FINDING OF FACTS AND CONCLUSIONS OF LAW

25 Petitioner contends that the guilty plea herein must be set  
 26 aside because the record does not affirmatively demonstrate it was  
 27 knowingly and voluntarily entered.

28 //

CEPS

1 The law in Nevada clearly establishes that a plea of guilty is  
2 presumptively valid and the burden is on the defense to show that  
3 the plea was not voluntarily entered. Wingfield v. State, 91 Nev.  
4 336 (1975). Undoubtedly, the petitioner had discussed his guilty  
5 plea with his attorney. The case of Patton v. Warden, 91 Nev. 1,  
6 530 P.2d 107 (1975), suggests that the presence and advise of  
7 counsel is a significant factor in determining the voluntariness of  
8 a plea of guilty. Furthermore, the Nevada Supreme Court, citing  
9 Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463 (1970), makes  
10 it clear in the case of Heffley v. Warden, 89. Nev. 573, 516 P.2d  
11 1403 (1973), that the guidelines for voluntariness of pleas of  
12 guilty "do not require the articulation of talismanic phrases. It  
13 required only that the record must affirmatively disclose that a  
14 defendant who plead guilty entered his plea understandingly and  
15 voluntarily."

16 In Hanly v. State, 97 Nev. 130, 624 P.2d 1387 (1981), the  
17 court listed the requirements for a guilty plea.

18 This court has held in Higley v. Sheriff, 86 Nev. 774, 476  
19 P.2d 959 (1970), in harmony with the United States Supreme Court  
20 decision Boykin v. Alabama, 395 U.S. 238 (1969), that in cases  
21 where a guilty plea is accepted the record should affirmatively  
22 show that certain minimal requirements are met. These are  
23 generally,

24 1. An understanding waiver of constitutional rights and  
25 privileges,

26 2. Absence of coercion by threat or promise of leniency,

27 3. Understanding of consequences of the plea, the range of  
28 punishments, and

1       4. An understanding of the charge, the elements of the  
2 offense. See also Wilson v. State, 99 Nev. 362, 664 P.2d 328  
3 (1983).

4       The Court fully explained the petitioner's rights and the  
5 effect of his entry of a guilty plea. A review of the transcript  
6 of entry of plea reflects that the petitioner responded to  
7 questions by the Court and offered a factual basis for the entry of  
8 plea.

9       Based on the above the petitioner entered a full, knowing plea  
10 of guilty which a review of the record reflected. Accordingly, the  
11 post-conviction petition on this ground is denied.

12       The petitioner contends that he was denied his right to  
13 effective assistance of counsel under Strickland v. Washington, 466  
14 U.S. 668 (1984), and Warden v. Lyons, 100 Nev. 430, 683 P.2d 504  
15 (1984), cert. denied, 471 U.S. 1004 (1985), at his trial.

16       Traditionally, in Nevada, the defendant was denied effective  
17 assistance of counsel only if the proceedings are reduced to a  
18 sham, farce, or pretense. Lavell v. State, 92 Nev. 546 (1976).  
19 However in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), the  
20 Supreme Court indicated that Nevada's traditional standard has been  
21 supplanted by the United States Supreme Court's adoption of the  
22 "reasonably effective assistance" test of Strickland v. Washington,  
23 466 U.S. 668, 104 S.Ct. 2052 (1984).

24       In Strickland, the United States Supreme Court held that to  
25 prevail on a claim of ineffective assistance of counsel, a  
26 defendant must first show that counsel's performance was deficient.  
27 This requires showing that counsel made errors so serious that  
28 counsel was not functioning as the counsel guaranteed by the Sixth

1 Amendment. Secondly, the defendant must show the deficient  
2 performance prejudiced the defense. The Supreme Court stated that  
3 this requires showing that counsel's errors were so serious as to  
4 deprive the defendant of a fair result. A person alleging  
5 ineffective counsel must make both of the aforementioned showings  
6 to prevail. A fair assessment of an attorney's performance  
7 requires that every effort be made to eliminate the distorting  
8 efforts of hindsight. Strickland, 466 U.S. at p. 689; Ford v.  
9 State, 105 Nev. 850, 853, 784 P.2d 951 (1989).

10 It is presumed that counsel fully discharged his duties, and  
11 that presumption can only be overcome by strong and convincing  
12 proof to the contrary. Warden v. Lischko, 90 Nev. 221, 223, 523  
13 P.2d 6 (1974). Donovan v. State, 94 Nev. 671, 674, 584 P.2d 708  
14 (1978). The petitioner's allegations fail to rebut this  
15 presumption either singly or in combination. Furthermore, there  
16 has been no showing that counsel's performance was deficient.

17 Effective counsel does not mean errorless counsel, United  
18 States v. Yanishevsky, *supra*: United States v. Beasley, 479 F.2d  
19 1124 (5th Cir. 1973), cert. denied 414 U.S. 924, reh. denied 414  
20 U.S. 1052. What appears by hindsight to be wrong or poorly advised  
21 decision of tactics or strategy is not sufficient to meet the  
22 defendant's heavy burden of proving ineffective counsel. Tactical  
23 decisions regarding the conduct of a defendant's case are virtually  
24 unchallengeable absent extraordinary circumstances. Mazzan v.  
25 State, 105 Nev. 745, 783 P.2d 430 (1989). Ford v. State, 105 Nev.  
26 157, 850 P.2d 951 (1989). The petitioner has not set forth such  
27 extraordinary circumstances. He has not established that in light  
28 of all the circumstances the identified acts or omissions of